

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Kelly* [2014] QSC 283

PARTIES: **IN THE WILL of JOYCE DOUGLAS MILDRED KELLY (deceased)**

FILE NO/S: BS9469/14

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 4 December 2014

DELIVERED AT: Brisbane

HEARING DATE: 21 October 2014

JUDGE: Alan Wilson J

ORDER: **Application dismissed.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – WHEN LOST, MISLAID, DESTROYED OR NOT AVAILABLE – GENERALLY – where the deceased’s original last will cannot be located – where the applicant, the deceased’s daughter, is named as executor in a copy of that original last will – where the applicant has also located a draft version of the original last will – where the applicant applies for a determination that the copy is the deceased’s last valid will under s 18 of the *Succession Act* 1981 (Qld) – whether a determination of that type should be made in circumstances where the original will is missing

*Succession Act* 1981 (Qld), s 10, s 18  
*Uniform Civil Procedure Rules* 1999 (Qld), r 597, r 602

*Re Cardie* [2013] QSC 265, cited  
*Re Colassin* [2012] QSC 155, cited  
*Re Gindrod (deceased)* [2014] QSC 158, cited  
*Re Henderson* [1996] 1 Qd R 249, cited  
*Re Masters* (1994) 33 NSWLR 446, cited  
*McCauley v McCauley* (1910) 10 CLR 434, cited  
*Proctor v Klauke & Ors* [2011] QSC 425, cited

COUNSEL: ME Pope for the applicant

SOLICITORS: DGM Lawyers for the applicant

- [1] **Alan Wilson J:** Joyce Douglas Mildred Kelly died on 6 June 2014. Her husband died before her, in 2010, but she has been survived by two of her three children: Lynette Joy Ellison, and Elizabeth Anne Watson (formerly Deshayes).
- [2] Ms Ellison has brought an application under s 18 of the *Succession Act* 1981 (Qld) for a grant of probate of a photocopy of her mother's original last will. (She cannot find the original.) Unfortunately the application is misconceived, as at least one previous decision of this Court makes clear.
- [3] The evidence shows that Mrs Kelly and her husband executed separate wills on 18 October 1989. Those wills came into the safe-keeping of Sydney solicitors, Bicknell & Monteith Lawyers. On 1 November 1996 the lawyers sent those wills, on request, by ordinary mail to Mr and Mrs Kelly at a post office box at Nerang. (The solicitors also enclosed, with the letter, an earlier will of Mrs Kelly dated 19 November 1984.<sup>1</sup>)
- [4] The solicitors have no record of any acknowledgement of receipt of the wills from the Kellys, although the letter sent with the wills was never returned to them.<sup>2</sup>
- [5] Despite having made '*all efforts to search in likely and unlikely places at [her] home in [her] late mother's belongings and any other place where [it] might be kept*', Ms Ellison has been unable to locate the original copy of her mother's will dated 18 October 1989.<sup>3</sup>
- [6] She has only been able to find what appears to be a photocopy of that original document,<sup>4</sup> and an undated draft will.<sup>5</sup>
- [7] Those documents are identical except in the way they address the event that Mr Kelly dies before her: the photocopy of Mrs Kelly's 1989 will appoints Ms Ellison as executor in that event, whereas the draft appoints her sister Ms Deshayes (as she then was). Both documents purport to give the whole of Mrs Kelly's estate to the executor, on trust, to be divided equally between Ms Ellison and Ms Watson.
- [8] The draft is unexecuted. However, the photocopy of the 1989 will suggests it was executed in accordance with s 10 of the *Succession Act*: it is in writing, and was apparently signed by Mrs Kelly in the presence of two witnesses who attested and signed the document in her presence, and of each other.
- [9] Section 18 gives the court power to dispense with formal execution requirements for a will, or a document purporting to alter or revoke a will:

**18 Court may dispense with execution requirements for will, alteration or revocation**

- (1) This section applies to a document, or a part of a document, that—
- (a) purports to state the testamentary intentions of a deceased person; and
  - (b) has not been executed under this part.

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<sup>1</sup> Affidavit of Graeme Philip Monteith, affirmed 19 September 2014, Exhibit A.

<sup>2</sup> Ibid, at [5].

<sup>3</sup> Affidavit of Lynette Joy Ellison, affirmed 26 September 2014, at [9].

<sup>4</sup> Ibid, Exhibit C

<sup>5</sup> Ibid, Exhibit D.

(2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is **satisfied that the person intended the document or part to form the person's will**, an alteration to the person's will or a full or partial revocation of the person's will.

(3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—

- (a) any evidence relating to the way in which the document or part was executed; and
- (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.

(4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).

(emphasis added)

[10] A determination under s 18(2) can only be made where the preconditions in subsection (1) are satisfied, namely: that the relevant document purports to state the testamentary intention of the deceased, and that it has not been executed under Part 2, i.e. in accordance with s 10.

[11] The photocopy must be seen as stating Mrs Kelly's testamentary intentions, as required by s 18(1)(a), assuming that it is what it appears to be – a copy of a will executed with all proper formalities. (For the sake of completeness it must be noted that the photocopy has not, itself, been formally executed under s 10 (s 18(1)(b).)

[12] The difficulty with an application under s 18 which confronts the applicant is that the court must, under the provision, also be satisfied that the deceased intended the document in question to *constitute* his or her will.<sup>6</sup>

[13] Mrs Kelly cannot have intended that the photocopy would, by itself, constitute her will. She did not re-execute the photocopy, so as to fully comply with the statutory requirements for formal validity. Rather, her intention must have been for the original signed document, which the photocopy replicates, to be her last valid will.<sup>7</sup> All the evidence suggests that the document in question is a photocopy of a will that *was* properly executed. In other words, the testatrix intended that original document would be her last will – not the photocopy before the court.

[14] The circumstances to which s 18 is addressed are not, therefore, invoked here.

[15] The appropriate course would have been for Ms Ellison to apply for a grant of probate under r 597 of the *Uniform Civil Procedure Rules*.

[16] The former Chief Justice came to this conclusion in analogous circumstances in *Re Cardie*.<sup>8</sup> de Jersey CJ discussed the fact that the authority to admit copies of missing

<sup>6</sup> *Re Masters* (1994) 33 NSWLR 446, at 449; followed in *Proctor v Klauke & Ors* [2011] QSC 425, at [35]; and, *Re Gindrod (deceased)* [2014] QSC 158, at [16].

<sup>7</sup> Chief Justice de Jersey came to the same conclusion in *Re Cardie* [2013] QSC 265, at [18].

<sup>8</sup> [2013] QSC 265.

wills to probate derives from the pre-existing common law jurisdiction, accessed via an application under r 597, rather than under s 18.<sup>9</sup>

- [17] There are also, in the Queensland cases, examples of successful applications under r 597 which may assist the applicant. A grant of probate of a copy of a will was made in circumstances like those arising here in *Re Colassin*.<sup>10</sup> In that case, the person named as executor in a copy of a will of the deceased could not locate the original. The persons who witnessed the deceased signing the original will gave evidence to that effect, and the solicitor who prepared the will also gave evidence as to its proper execution. The executor's application was unopposed.
- [18] P McMurdo J held that it was appropriate to grant probate of the copy of the will until the original or a more authenticated copy was found, and provided to the registry. In making that order, his Honour followed Williams J in *Re Henderson*, where it was suggested that such an order may be appropriate where the facts are '*fairly clear and simple*' in terms of there being no evidence that the testator intended to revoke the original will, and no opposition from other beneficiaries.<sup>11</sup>
- [19] The same outcome may well be available to Ms Ellison in an application for probate of the photocopy of the will in this matter. The affidavit evidence that has been filed for this application already goes some way to satisfying the evidentiary requirements for an application for a grant.<sup>12</sup> Evidence from the solicitors who drafted, and/or the witnesses to the testatrix's signature, has not been sought or provided here but, it appears, may well be available to support a submission that the original will was duly executed:<sup>13</sup> the photocopy indicates a solicitor, and a secretary, witnessed the will.
- [20] Further evidence may also need to be produced to rebut the presumption that, because the original cannot be found, it had been destroyed at some time by Mrs Kelly *animo revocandi*: i.e., with the intention to revoke it. The presumption will arise where the original will was known to have been in the will-maker's possession at some earlier time, but is subsequently missing at the time of their death.<sup>14</sup>
- [21] In any event the only beneficiaries under Mrs Kelly's wills, her daughters, would also be the only beneficiaries under the intestacy rules. The only benefit in applying for probate may be in saving prospective costs.<sup>15</sup> No doubt questions of costs and economy will guide the applicant, and her legal advisors.
- [22] That said the present application must, for the reasons given, be refused.

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<sup>9</sup> Ibid, at [16] and [19].

<sup>10</sup> [2012] QSC 155.

<sup>11</sup> [1996] 1 Qd R 249, at 251.

<sup>12</sup> *UCPR*, r 602.

<sup>13</sup> *Re Colassin* [2012] QSC 155, at [6].

<sup>14</sup> *McCauley v McCauley* (1910) 10 CLR 434, at 438.

<sup>15</sup> *Re Cardie* [2013] QSC 265, at [5].